EXHIBIT 26

Kayes v. Pacific Lumber Co.
C.A.9 (Cal.),1995.

United States Court of Appeals,Ninth Circuit.
Clarence KAYES; Gene Kennedy; Sharon Kennedy; Wiley Lacy; John R. Maurer; Lester Reynolds; Shirley Reynolds; Hollis Rollins; Donald Filby; Jack Miller; James Lovell; Paul S. Brady; Wilfred A. Blain; Lloyd S. Tucker; Donald J. Schoenhofer, Plaintiffs-Appellants,
v.
PACIFIC LUMBER COMPANY; Maxxam Group, Inc.; Maxxam, Inc.; Charles Hurwitz; Paul N. Schwartz; James Iaco; William Leone, Defendants-Appellees.
Clarence KAYES; Gene Kennedy; Sharon Kennedy; Wiley Lacy; John R. Maurer; Lester Reynolds; Shirley Reynolds; Hollis Rollins; Donald Filby; Jack Miller; James Lovell; Paul S. Brady; Wilfred A. Blain; Lloyd S. Tucker, Plaintiffs-Appellees,
v.
PACIFIC LUMBER COMPANY; Maxxam Group, Inc.; Maxxam, Inc.; Charles Hurwitz; Paul N. Schwartz; James Iaco; William Leone, Defendants-Appellants.
Nos. 93-16271, 93-16575.

Argued and Submitted May 10, 1994.
Decided April 10, 1995.

Former participants or beneficiaries of terminated pension plan filed ERISA action on behalf of beneficiaries and participants alleging breach of fiduciary duties. The United States District Court for the Northern District of California, Saundra Brown Armstrong, J., denied defendant's motion for summary judgment, denied plaintiffs' request for class certification, dismissed certain named plaintiffs as representatives, and granted defendant's motion for summary judgment on prohibited transaction claims. Plaintiffs appealed and employer cross-appealed. The Court of Appeals, Choy, Circuit Judge, held that: (1) plaintiffs had standing; (2) claims were not barred by McCarran-Ferguson Act; (3) officer of named plan fiduciary could not be shielded from personally becoming a fiduciary so long as he acted within corporate form where corporation was named plan fiduciary; (4) action was not derivative one which had to be brought under rule applicable to shareholder derivative class action suits; (5) remand was necessary to determine adequacy of plaintiffs as class representatives; (6) use of residual plan surplus as collateral for bridge loan to finance corporate takeover stayed claim for engaging in prohibited transaction in violation of ERISA; and (7) interim attorney fees were available under ERISA to extent they were available under civil rights statutes.

Affirmed in part and reversed in part.

West Headnotes

[1] Federal Courts 170B 776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases
Standing is a question of law which Court of Appeals reviews de novo.

[2] Labor and Employment 231H 646

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(K) Actions
231HVII(K)3 Actions to Enforce Statutory or Fiduciary Duties
231Hk646 k. Parties in General; Standing. Most Cited Cases
(Formerly 296k85)
Under Pension Annuitants Protection Act, former participants or beneficiaries of terminated pension plans have standing to seek relief where fiduciary breach has occurred involving purchase of insurance contracts or annuities in connection with their termination as plan participants; abrogating *Kuntz*, 785 F.2d 1410. Employee Retirement Income Security Act of 1974, § 502(a)(9), as amended, 29 U.S.C.A. § 1132(a)(9).

[3] Federal Courts 170B 776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases

Applicability of McCarran-Ferguson Act to ERISA is a question of law which Court of Appeals reviews de novo. McCarran-Ferguson Act, § 1 et seq., 15 U.S.C.A. § 1011 et seq.; Employee Retirement Income Security Act of 1974, § 2 et seq., as amended, 29 U.S.C.A. § 1001 et seq.

[4] Insurance 217 1101

217 Insurance
217III What Law Governs
217III(B) Preemption; Application of State or Federal Law
217k1101 k. The "Business of Insurance" in General. Most Cited Cases
(Formerly 217k3.1)

States 360 18.41

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.41 k. Insurance. Most Cited Cases
(Formerly 217k3.1)

McCarran-Ferguson Act, by its own terms, does not preclude construction of federal statute that would affect state law if congressional act "specifically relates to the business of insurance." McCarran-Ferguson Act, § 2(b), 15 U.S.C.A. § 1012(b).

[5] Insurance 217 1117(1)

217 Insurance
217III What Law Governs
217III(B) Preemption; Application of State or Federal Law
217k1102 Particular Laws or Activities
217k1117 Employee Benefits
217k1117(1) k. In General. Most Cited Cases
(Formerly 296k43.1)

States 360 18.51

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.45 Labor and Employment
360k18.51 k. Pensions and Benefits. Most Cited Cases

McCarran-Ferguson Act does not preempt ERISA's fiduciary standards in areas governed by state insurance laws; although ERISA savings clause generally precludes application of ERISA's broad preemption provision to state insurance clause, savings clause does not prevent application of ERISA's fiduciary standards in areas governed by state insurance laws. McCarran-Ferguson Act, § 2(b), 15 U.S.C.A. § 1012(b); Employee Retirement Income Security Act of 1974, § 514(b)(2)(A), as amended, 29 U.S.C.A. § 1144(b)(2)(A).

[6] Federal Courts 170B 595

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(C) Decisions Reviewable
170BVIII(C)2 Finality of Determination
170Bk585 Particular Judgments, Decrees or Orders, Finality
170Bk595 k. Summary Judgment; Judgment on Pleadings. Most Cited Cases

Court of Appeals had jurisdiction to consider whether defendants in ERISA action were plan fiduciaries where district court addressed summary judgment motion of plaintiffs in current action as well as Secretary of Labor in related action, the two cases were treated as related and proceeded concurrently pursuant to trial order and held defendants were plan fiduciaries, and granted summary judgment on that point, but denied summary judgment as to other defendants, and held that plaintiffs lacked standing; district court ruled orally on issue as it related to both parties, and fact that it later found that plaintiffs incurred action lacked standing did not change finality of order.

[7] Federal Courts 170B 776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases

Court of Appeals reviews grant of summary judgment de novo, viewing all evidence in light most favorable to nonmoving party.

[8] Labor and Employment 231H 461

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(C) Fiduciaries and Trustees
231Hk460 Who Are Fiduciaries
231Hk461 k. In General. Most Cited Cases
(Formerly 296k44)

ERISA permits corporations to be fiduciaries. Employee Retirement Income Security Act of 1974, § 3(9), as amended, 29 U.S.C.A. § 1002(9).

[9] Labor and Employment 231H 463

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(C) Fiduciaries and Trustees
231Hk460 Who Are Fiduciaries
231Hk463 k. Officers, Directors and Partners. Most Cited Cases
(Formerly 296k44)

Corporate officers could be liable as fiduciaries on the basis of their conduct and authority with respect to ERISA plans even if corporation was named plan fiduciary and corporate officer was not named plan fiduciary; "fiduciary" status was determined under functional test. Employee Retirement Income Security Act of 1974, § 3(21)(A), (21)(A)(iii), as amended, 29 U.S.C.A. § 1002(21)(A), (21)(A)(iii).

[10] Labor and Employment 231H 463

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(C) Fiduciaries and Trustees
231Hk460 Who Are Fiduciaries
231Hk463 k. Officers, Directors and Partners. Most Cited Cases
(Formerly 296k44)

Interpretation of ERISA plan which purported to relieve officers of corporation which was named as plan fiduciary from fiduciary responsibility or liability was void as against public policy, to the extent that it prevented individuals acting in fiduciary capacity from being found liable as fiduciaries. Employee Retirement Income Security Act of 1974, § 410, as amended, 29 U.S.C.A. § 1110.

[11] Labor and Employment 231H 461

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(C) Fiduciaries and Trustees
231Hk460 Who Are Fiduciaries
231Hk461 k. In General. Most Cited Cases
(Formerly 296k44)

ERISA plan fiduciary status depends upon individual's functional role rather than title. Employee Retirement Income Security Act of 1974, § 3(21)(A), as amended, 29 U.S.C.A. § 1002(21)(A).

[12] Labor and Employment 231H 461

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(C) Fiduciaries and Trustees
231Hk460 Who Are Fiduciaries
231Hk461 k. In General. Most Cited Cases
(Formerly 296k44)

Labor and Employment 231H 473

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(C) Fiduciaries and Trustees
231Hk472 What Activities Are in Fiduciary Capacity
231Hk473 k. In General. Most Cited Cases
(Formerly 296k49, 296k43.1)

Corporation named as ERISA plan "fiduciary" cannot shield its decision makings from personal liability merely by stating in plan documents that all their actions are taken on behalf of the company and not in a fiduciary capacity. Employee Retirement Income Security Act of 1974, § 3(21)(A), as amended, 29 U.S.C.A. § 1002(21)(A).

[13] Federal Civil Procedure 170A 2497.1

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment

170AXVII(C)2 Particular Cases
170Ak2497 Employees and Employment Discrimination, Actions Involving
170Ak2497.1 k. In General. Most Cited Cases
Material issues of fact existed, precluding summary judgment as to whether subsidiary corporations and corporate officers were ERISA plan fiduciaries in light of questions of fact regarding discretionary duty and control. Employee Retirement Income Security Act of 1974, § 3(21)(A), as amended, 29 U.S.C.A. § 1002(21)(A).

[14] Federal Courts 170B 776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases
Whether ERISA claim could be brought as class action was a question of law which Court of Appeals reviewed de novo. Employee Retirement Income Security Act of 1974, § 2 et seq., as amended, 29 U.S.C.A. § 1001 et seq.

[15] Federal Civil Procedure 170A 184.5

170A Federal Civil Procedure
170AII Parties
170AII(D) Class Actions
170AII(D)3 Particular Classes Represented
170Ak184 Employees
170Ak184.5 k. In General. Most Cited Cases
Action by former participants or beneficiaries of terminated pension plan alleging fiduciary breach involving purchase of insurance contracts or annuities in connection with their termination as plan participants could be maintained as class action. Employee Retirement Income Security Act of 1974, § 2 et seq., as amended, 29 U.S.C.A. § 1001 et seq.

[16] Federal Civil Procedure 170A 188

170A Federal Civil Procedure
170AII Parties
170AII(D) Class Actions
170AII(D)3 Particular Classes Represented
170Ak188 k. Trust Beneficiaries. Most Cited Cases
When trust beneficiary brings derivative suit on behalf of trust, specific provisions of class action pleading rule governing corporate shareholder derivative suit are not controlling. Fed.Rules Civ.Proc.Rule 23.1, 28 U.S.C.A.

[17] Labor and Employment 231H 649

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(K) Actions
231HVII(K)3 Actions to Enforce Statutory or Fiduciary Duties
231Hk649 k. Pleading. Most Cited Cases
(Formerly 296k83.1)
Class action pleading rule applicable to derivative actions brought by one or more shareholders or members to enforce right of corporation or unincorporated association did not apply to plaintiff suing as plan beneficiaries to enforce rights of ERISA plan against fiduciaries. Employee Retirement Income Security Act of 1974, § 2 et seq., as amended, 29 U.S.C.A. § 1001 et seq.; Fed.Rules Civ.Proc.Rule 23.1, 28 U.S.C.A.

[18] Labor and Employment 231H 643

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(K) Actions
231HVII(K)3 Actions to Enforce Statutory or Fiduciary Duties
231Hk643 k. In General. Most Cited Cases
(Formerly 296k83.1)
Although suit by former participants or beneficiaries of terminated pension plan was "derivative" in broad sense, it did not fall within scope of class action rule applicable to derivative actions brought by shareholders or members to enforce a right of corporation or unincorporated association. Employee Retirement Income Security Act of 1974, § 2 et seq., as amended, 29 U.S.C.A. § 1001 et seq.; Fed.Rules Civ.Proc.Rule 23.1, 28 U.S.C.A.

[19] Corporations 101 202

101 Corporations
101IX Members and Stockholders
101IX(C) Suing or Defending on Behalf of Corporation
101k202 k. Right to Sue or Defend in General. Most Cited Cases
Because of fear that shareholder derivative suits could subvert basic principle of management control over corporate operations, courts have generally characterized shareholder derivative suits as "a remedy of last resort."

[20] Federal Civil Procedure 170A 184.5

170A Federal Civil Procedure
170AII Parties
170AII(D) Class Actions
170AII(D)3 Particular Classes Represented
170Ak184 Employees
170Ak184.5 k. In General. Most Cited Cases
In action by plan beneficiaries to enforce rights of ERISA plan against fiduciaries, district court erred in concluding that class representatives' claims were not "typical"; although plaintiff's common claim was a derivative claim rather than direct claim, class action rule only required that claims be typical, not that claims be direct. Fed.Rules Civ.Proc.Rule 23(a)(3), 28 U.S.C.A.

[21] Federal Courts 170B 817

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk817 k. Parties; Pleading. Most Cited Cases
Court of Appeals reviews for abuse of discretion district court's determination regarding adequacy of representation by named plaintiffs. Fed.Rules Civ.Proc.Rule 23.1, 28 U.S.C.A.

[22] Federal Civil Procedure 170A 164

170A Federal Civil Procedure
170AII Parties
170AII(D) Class Actions
170AII(D)1 In General
170Ak164 k. Representation of Class; Typicality. Most Cited Cases
Reason vindictiveness on part of class representative is considered as factor in evaluating adequacy of representation is to render ineligible individuals who possess animus that would preclude possibility of suitable settlement. Fed.Rules Civ.Proc.Rule 23.1, 28 U.S.C.A.

[23] Federal Civil Procedure 170A 184.5

170A Federal Civil Procedure
170AII Parties
170AII(D) Class Actions
170AII(D)3 Particular Classes Represented
170Ak184 Employees
170Ak184.5 k. In General. Most Cited Cases
District court improperly dismissed five plaintiffs as inadequate class representatives based on finding that they were vindictive toward defendants on basis of long-standing multiple grievances against defendant; fact that plaintiffs had pursued state court action, held to be preempted, against defendant did not indicate vindictiveness, and two other suits for shareholder derivatives regarding leveraged buyout of plan fiduciary, revealing some animosity of city toward corporate directors for allowing takeover, did not constitute evidence of vindictiveness precluding adequate representation of class. Fed.Rules Civ.Proc.Rule 23.1, 28 U.S.C.A.

[24] Federal Courts 170B 812

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk812 k. Abuse of Discretion. Most Cited Cases
Court of Appeals finds abuse of discretion when it has definite and firm conviction that court below committed clear error of judgment in conclusion it reached upon weighing of relevant facts; district court may abuse its discretion if it does not apply correct law or if it rests its decision on clearly erroneous finding of material fact. Fed.Rules Civ.Proc.Rule 23.1, 28 U.S.C.A.

[25] Federal Civil Procedure 170A 184.5

170A Federal Civil Procedure
170AII Parties
170AII(D) Class Actions
170AII(D)3 Particular Classes Represented
170Ak184 Employees
170Ak184.5 k. In General. Most Cited Cases

Named plaintiffs' attempt to buy out employer corporation from acquiror and antiacquiror platform in another plaintiff's campaign for seat on county board of supervisors were factors which could be considered by district court in determination of whether named plaintiffs were proper representatives for class consisting of former participants or beneficiaries of terminated pension plan. Fed.Rules Civ.Proc.Rule 23.1, 28 U.S.C.A.

[26] Federal Civil Procedure 170A 164

170A Federal Civil Procedure
170AII Parties
170AII(D) Class Actions
170AII(D)1 In General
170Ak164 k. Representation of Class; Typicality. Most Cited Cases

With regard to counsel's representation of plaintiff class, appearance of divided loyalties referred to differing and potentially conflicting interests and was not limited to instances manifesting such conflict, even though there had not yet been reason to believe improper influence had resulted from representation of two parties with conflicting interests. Fed.Rules Civ.Proc.Rule 23.1, 28 U.S.C.A.

[27] Labor and Employment 231H 488

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(C) Fiduciaries and Trustees
231Hk487 Investments and Expenditures
231Hk488 k. In General. Most Cited Cases
(Formerly 296k48)

Purchasing replacement annuities as part of plan termination was not a per se violation of ERISA even if accomplished for improper purposes, such as defendant's alleged intent to maximize recovery of surplus plan assets. Employee Retirement Income Security Act of 1974, § 406, as amended, 29 U.S.C.A. § 1106.

[28] Labor and Employment 231H 493

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(C) Fiduciaries and Trustees
231Hk487 Investments and Expenditures
231Hk493 k. Prohibited Transactions; Parties in Interest. Most Cited Cases
(Formerly 296k48)

In determining whether plan fiduciary engaged in prohibited transaction in violation of ERISA, two-fold test was used to determine whether item in question constitutes "asset of the plan"; (1) whether item in question may be used to the benefit (financial or otherwise) of the fiduciary, and (2) whether such use is at expense of plan participants or beneficiaries. Employee Retirement Income Security Act of 1974, § 406, as amended, 29 U.S.C.A. § 1106.

[29] Labor and Employment 231H 493

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(C) Fiduciaries and Trustees
231Hk487 Investments and Expenditures
231Hk493 k. Prohibited Transactions; Parties in Interest. Most Cited Cases
(Formerly 296k48)

Plan fiduciary's use of funds which were plan assets as collateral for bridge loan to finance corporate takeover was use of collateral for purpose which did not benefit the plan and was a use of plan assets at the expense of plan participants under ERISA provision defining prohibited transactions involving plan assets, even though loan transaction did not jeopardize plan assets or affect beneficiaries' vested benefits under plan. Employee Retirement Income Security Act of 1974, § 406, as amended, 29 U.S.C.A. § 1106.

[30] Labor and Employment 231H 488

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(C) Fiduciaries and Trustees
231Hk487 Investments and Expenditures
231Hk488 k. In General. Most Cited Cases
(Formerly 296k48)

Corporations should not be permitted to rely on ERISA plan assets to finance takeovers or other risk

ventures. Employee Retirement Income Security Act of 1974, § 406, as amended, 29 U.S.C.A. § 1106.

[31] Federal Courts 170B 776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases
Whether interim attorney fees are available under ERISA is question of law which Court of Appeals reviews de novo. Employee Retirement Income Security Act of 1974, § 2 et seq., as amended, 29 U.S.C.A. § 1001 et seq.

[32] Labor and Employment 231H 708

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(K) Actions
231HVII(K)8 Costs and Attorney Fees
231Hk708 k. In General. Most Cited Cases
(Formerly 296k88)
Interim attorney fees are available under ERISA to extent that they are available under civil rights statutes. Employee Retirement Income Security Act of 1974, § 502(g), as amended, 29 U.S.C.A. § 1132(g); 42 U.S.C.A. § 1988; Civil Rights Act of 1964, §§ 204(b), 706(k), 42 U.S.C.A. §§ 2000a-3(b), 2000e-5(k).

***1452**Alfred H. Sigman, Sigman, Lewis & Feinberg, Oakland, CA, for plaintiffs-appellants-cross-appellees.
Kathleen V. Fisher and James F. McCabe, Morrison & Foerster, San Francisco, CA, for defendants-appellees-cross-appellants.
Timothy Hauser, U.S. Dept. of Labor, Washington, DC, for amicus Secretary of Labor.
Warren Gorlick, American Ass'n of Retired Persons, Washington, DC for amicus American Ass'n of Retired Persons.

Appeals from the United States District Court for the Northern District of California.

Before: CHOY, POOLE, and REINHARDT, Circuit Judges.

***1453**CHOY, Circuit Judge:

I. FACTUAL AND PROCEDURAL BACKGROUND

This appeal arises out of an action brought by Plaintiffs under the Employee Retirement Income and Security Act ("ERISA"), 29 U.S.C. § 1001 et seq., on behalf of beneficiaries and participants of the Pacific Lumber Company Pension Plan ("the Plan"). Plaintiffs are former employees, or eligible spouses of former employees of Pacific Lumber Company ("PLC") or of its subsidiaries. Defendant Charles Hurwitz is principal owner of Maxxam, Inc. ("Maxxam"), which owns Maxxam Group Inc. ("MGI"), which in turn owns PLC. Maxxam and MGI are also defendants. Defendant William Leone is the former President and CEO of PLC, and former director of Maxxam and MGI. Defendants Schwartz and Iaco are present or former executives of Maxxam or MGI.[FN1]

> FN1. For the purposes of this opinion, all the plaintiffs are collectively referred to as "Plaintiffs," unless referred to individually; the defendants are referred to as "PLC" or "Defendants," unless referred to individually. Arguments put forth in the Defendants' briefs are attributed to "PLC," even though PLC is only one defendant. The Secretary of Labor is referred to as "the Secretary," or "the Secretary of Labor."

This action was filed in response to the termination in 1986 of the Plan, and the subsequent purchase by PLC of a group annuity contract from Executive Life Insurance Company ("ELIC"). The Plan termination followed the successful hostile takeover of PLC by MGI in the fall of 1985. The takeover was financed by $450 million in "junk" bonds, nearly $100 million of which were purchased by ELIC.

Effective March 31, 1986, PLC terminated the Plan. Pursuant to the Plan's terms, the Plan's fiduciaries chose to pay lump sums to Plan participants with less than $3,500 in vested benefits. For the rest of the participants and beneficiaries, PLC initiated a bidding procedure to obtain a group

annuity contract to pay vested retirement benefits. ELIC was added to the list of potential bidders at Hurwitz's insistence. On October 1, 1986, despite negative evaluations (the details of which are relevant to the underlying lawsuit, but not to the outcome of this appeal), ELIC was selected to provide the group annuity. ELIC's bid was the lowest offered, $2.7 million lower than the next lowest bid. In accepting this bid, $62 million in "surplus" Plan assets were captured by defendants pursuant to the terms of the Plan.

Plaintiffs filed this suit on September 25, 1989, contending that the above transactions were in violation of the fiduciary duties of ERISA § 404, 29 U.S.C. § 1104, and constituted prohibited transactions under ERISA § 406, 29 U.S.C. § 1106.

ELIC was taken over by the State of California on April 11, 1991, due to its precarious financial condition. Payments were suspended for a short time, and resumed at 70% in May. Subsequently, a Stipulated Order was entered on August 14, 1991, under which PLC agreed to make up retroactively and progressively any shortfall in payments due from ELIC, provide Plaintiffs' counsel with 45 days notice prior to termination of such payments, and notify all Plan participants of pendency of the litigation and of the terms of the agreement.[FN2] The California conservatorship concluded with the transferring of all of ELIC's "restructured" liabilities to a newly formed Aurora Life Assurance Co. Aurora's financial stability is undetermined at this point.

> FN2. There is some dispute as to whether the above concessions were made voluntarily or under threat of litigation. However, the voluntariness of the concessions is irrelevant to this appeal.

On June 12, 1991, the Secretary of Labor filed an action against the same defendants alleging violations of ERISA §§ 404 & 403, 29 U.S.C. §§ 1104 & 1103, based on the purchase and selection of an annuity. *Reich v. Pacific Lumber Co.,* No. C-91-1812-SBA (N.D.Cal. filed June 12, 1991). The two actions were not formally consolidated, but were treated as related cases and proceeded concurrently pursuant to the same pretrial order.

On March 8, 1993, Defendants moved for summary judgment on the grounds that ERISA's fiduciary duty provisions are inapplicable to the selection of an annuity provider,***1454** and that the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, precludes relief. The district court rejected both these assertions. PLC has filed a cross-appeal solely as to the holding regarding the McCarran-Ferguson Act.

On April 14, 1993, the district court denied Plaintiffs' request for class certification, finding that the action instead had to be maintained as a derivative suit pursuant to Fed.R.Civ.P. 23.1, and ordered Plaintiffs to file an amended complaint. The district court also dismissed certain named plaintiffs as inadequate representatives, and ordered Plaintiffs' counsel to withdraw from representing certain persons and entities with whom it found potential for conflicts of interest. Plaintiffs appeal this order in its entirety.

On May 11, 1993, Defendants moved for summary judgment on the two § 406 prohibited transactions claims. This motion was granted. Plaintiffs appeal this judgment.

On May 17, 1993, the district court held that PLC, Hurwitz, and Leone were fiduciaries as a matter of law, and that summary judgment as to the fiduciary status of the other defendants could not be determined as a matter of law due to unresolved issues of fact. PLC cross-appeals this order. In the same order, the district court held that Plaintiffs were no longer participants or beneficiaries under ERISA because the group annuity purchase provided them with an irrevocable commitment to payment of all vested benefits. Therefore, the district court held that they lacked standing to sue for any breach of fiduciary duty in the choice of the group annuity. On July 17, 1993, this holding was affirmed on reconsideration. Plaintiffs appeal this order.

Plaintiffs made two motions for interim attorneys fees, on June 13, 1992 and on July 26, 1993. Both were denied on the basis that they were premature; the second was also denied for lack of standing. Plaintiffs appeal this holding.

II. DISCUSSION

A. Plaintiffs' Standing

[1] The district court held that Plaintiffs lacked standing to sue within the meaning of 29 U.S.C. § 1132(a)(2) as they were no longer "participants" of a pension plan because the Plan had terminated prior to their commencing this action. Standing is a question of law which we review de novo. *Ellis v. City of La Mesa,* 990 F.2d 1518, 1523 (9th Cir.1993), *cert. denied,*512 U.S. 1220, 114 S.Ct. 2707, 129 L.Ed.2d 834 (1994).

ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), provides: "A civil action may be brought-(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title." A participant is defined as "any employee or former employee of an employer or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan." ERISA § 3(7), 29 U.S.C. § 1002(7). The district court followed this court's reasoning in *Kuntz v. Reese,* 785 F.2d 1410 (9th Cir.) (per curiam), *cert. denied,*479 U.S. 916, 107 S.Ct. 318, 93 L.Ed.2d 291 (1986), which held that former pension plan participants and beneficiaries who had received all of the vested benefits owed to them under the plan no longer had standing to sue on behalf of the terminated plan. The *Kuntz* court reasoned:

> Kuntz plaintiffs are not participants because, as former employees whose vested benefits under the plan have already been distributed in a lump sum, the Kuntz plaintiffs were not "eligible to receive a benefit," and were not likely to become eligible to receive a benefit, at the time that they filed the suit. Because, if successful, the plaintiffs' claim would result in a damage award, not in an increase of vested benefits, they are not plan participants.... any recoverable damages would not be benefits from the plan.

Id. at 1411. The district court declined to apply an exception to the *Kuntz* holding created in *Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock,* 861 F.2d 1406, 1408 (9th Cir.1988), which permitted former plan participants to pursue the equitable remedy of a constructive trust imposed on the plan fiduciary's ill-gotten profits.

***1455**[2] Congress has since directly addressed the ability of former pension plan participants and beneficiaries to bring suit under ERISA. The Pension Annuitants Protection Act of 1994 ("PAPA"), Pub.L. No. 103-401 (Oct. 22, 1994), amends ERISA § 502(a), 29 U.S.C. § 1132(a), to clarify that former participants or beneficiaries of terminated pension plans have standing to seek relief where, as here, a fiduciary breach has occurred involving the purchase of insurance contracts or annuities in connection with their termination as plan participants.[FN3] Section 2 of PAPA, 29 U.S.C. § 1132(a)(9), provides:

> FN3. PAPA clearly applies to this case as it states that "[t]he amendments made by this Act shall apply to any legal proceeding pending, or brought, on or after May 31, 1993." PAPA § 5. Because we conclude that PAPA controls our analysis of Plaintiffs' standing, we do not need to consider whether the district court erred in declining to apply the exception to *Kuntz* set forth in *Amalgamated Clothing.*

> [(a) A Civil action may be brought ...]
> (9) in the event that the purchase of an insurance contract or insurance annuity in connection with the termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title or the terms of the plan, by the Secretary, *by any individual who was a participant or beneficiary at the time of the alleged violation,* or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.

(emphasis added). PAPA represents, in part, a negative response to the district court's ruling in this case. As Representative Williams asserted:S. 1312 does not represent a change from current law, but rather a clarification made necessary because of recent court decisions. The courts have wrongly held that annuitants are not plan participants and therefore lack standing under ERISA to challenge the decision of the plan fiduciary to dispose of plan assets by purchasing annuities ... S. 1312 is designed to overturn this line of specific court cases.

130 Cong.Rec. H 10621 (Oct. 3, 1994).[FN4]

FN4. *See also* 139 Cong.Rec. S 9874 (July 29, 1993) (Senator Metzenbaum, one of the bill's sponsors, stating "this legislation is needed because of an unexpected decision by the U.S. Supreme Court 2 months ago"); 140 Cong.Rec. H 10621, 10622 (Oct. 3, 1994) (Secretary of Labor Robert Reich arguing that the amendment "is an important step in overcoming the problems created by Mertens and Kayes."); *id.*(statement by Representative Barrett); *id.*(statement by Representative Goodling). *See* Mertens v. Hewitt Associates, 508 U.S. 248, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993); *Kayes v. Pacific Lumber Co.*, C-89-3500 SBA, C-91-1812 SBA, 1993 WL 187730, 1993 U.S.Dist. LEXIS 7280 (N.D.Cal. May 17, 1993).

Accordingly, under ERISA § 502(a)(9), 29 U.S.C. § 1132(a)(9), Plaintiffs have standing to sue for "appropriate relief, including the purchase of a back-up annuity to remedy the breach." 139 Cong.Rec. S 9874, 9874 (July 29, 1993) (Sen. Metzenbaum). We reverse the dismissal of Plaintiffs' suit.

B. The Application of the McCarran-Ferguson Act to ERISA

[3] In its cross-appeal, PLC argues that the district court erred in holding that Plaintiffs' claims are not barred by the McCarran-Ferguson Act. They claim that the McCarran-Ferguson Act prohibits the construction of ERISA upon which Plaintiffs' suit is based. Specifically, Defendants argue that Plaintiffs' construction of ERISA violates McCarran-Ferguson because it would impose liability for selecting ELIC as an annuity provider even though ELIC is licensed and regulated by California's comprehensive insurance regulatory system. The McCarran-Ferguson Act, in relevant part, states: "No Act of Congress shall be construed to invalidate, impair, or supercede any law enacted by any State for the purpose of regulating the business of insurance ... unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b). The applicability of the McCarran-Ferguson Act to ERISA is a question of law, which we review de novo. *See* ***1456***General Motors Corp. v. California Bd. of Equalization*, 815 F.2d 1305, 1309 (9th Cir.1987), *cert. denied*, 485 U.S. 941, 108 S.Ct. 1122, 99 L.Ed.2d 282 (1988); *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984).

[4] The McCarran-Ferguson Act, by its own terms, does not preclude a construction of a federal statute that would affect state law if the congressional act "specifically relates to the business of insurance." 15 U.S.C. § 1012(b). Therefore, it must first be determined whether ERISA in general, or the section of ERISA relied upon by Plaintiffs in particular, "specifically relates to the business of insurance." *Id.*

In *Hewlett-Packard Co. v. Barnes*, 571 F.2d 502, 505 (9th Cir.), *cert. denied*, 439 U.S. 831, 99 S.Ct. 108, 58 L.Ed.2d 125 (1978), we held that California's Knox-Keene Act was preempted by ERISA to the extent that it attempted to regulate ERISA covered employee benefit plans as part of its comprehensive health care service legislation. It was claimed that because the Knox-Keene Act is a state law regulating insurance, construing ERISA to preempt it would violate the McCarran-Ferguson Act. We rejected that argument:

[A]ppellant's argument not only ignores those ERISA sections that undeniably "specifically relate" to the business of insurance, but also overlooks ERISA's "deemer" clause, which states that an employee benefit plan shall not be deemed to be engaged in the business of insurance for the purposes of state law. If McCarran-Ferguson applies, therefore, ERISA falls within the clause excepting federal laws that "specifically relate" to the business of insurance.

Id. at 505 (citations omitted). PLC asserts that the pronouncement in *Hewlett-Packard* that ERISA falls within the "specifically relates" exception does not indicate that ERISA in its entirety relates to the business of insurance. Rather, it contends that *Hewlett-Packard* holds only that the portion of ERISA which prohibits state laws from regulating employee benefit plans by treating them as insurance companies falls within the "specifically relates" exception.

The resolution of this issue turns on whether ERISA in its entirety "specifically relates" to insurance, or whether only those sections of ERISA

which explicitly deal with insurance should be deemed to "specifically relate" to insurance. We find guidance in the Supreme Court's opinion in *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank,* 510 U.S. 86, 114 S.Ct. 517, 126 L.Ed.2d 524 (1993). The issue in *Harris Trust* was whether the contract was a "guaranteed benefit policy" under ERISA § 401(b)(2), 29 U.S.C. § 1101(b)(2). As a preliminary matter, the Supreme Court held that the McCarran-Ferguson Act did not preclude application of ERISA's fiduciary standards to the insured's management of assets held under the contract. "Instead, we hold, ERISA leaves room for complementary or dual federal and state regulation, and calls for federal supremacy when the two regimes cannot be harmonized or accommodated." *Id.* at ----,114 S.Ct. at 525. In rejecting the McCarran-Ferguson Act preclusion, the Court stated:

> But as the United States points out, "ERISA, both in general and in the guaranteed benefit policy provision in particular, obviously and specifically relates to the business of insurance." Thus, the McCarran-Ferguson Act does not surrender regulation exclusively to the States so as to preclude the application of ERISA to an insurer's actions under a general account contract.
>
> *Id.* (citation omitted).

PLC contends that just as in *Hewlett-Packard,* the Court's holding in *Harris Trust* is not conclusive on this issue, because the Court was primarily concerned with the scope of ERISA § 401(b)(2), 29 U.S.C. § 1101(b)(2), which specifically refers to the business of insurance.[FN5] There are two flaws in PLC's argument. First of all, it is refuted ***1457** by the broad language used by the Supreme Court. The Court states that "*both* in general and ... in particular" ERISA relates to the business of insurance. *Id.* (emphasis added).[FN6] Secondly, PLC misreads the saving clause in ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A), to be evidence that the McCarran-Ferguson Act reserves the business of insurance to the states.[FN7] It is true that this court has held, and the Supreme Court has implied, that the effect of ERISA's saving clause was to preserve the McCarran-Ferguson Act's reservation of insurance regulation to the state. *See General Motors Corp.,* 815 F.2d at 1310;*Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 744 n. 21, 105 S.Ct. 2380, 2391 n. 21, 85 L.Ed.2d 728 (1985). However, in *Harris Trust* the Court rejected the argument that the saving clause always prevents application of ERISA:

> FN5.29 U.S.C. § 1101(b)(2) reads: "In the case of a plan to which a guaranteed benefit policy is issued by an insurer, the assets of such plan shall be deemed to include such policy, but shall not, solely by reason of the issuance of such policy, be deemed to include any assets of such insurer." The statute goes on to define "insurer" and "guaranteed benefit policy."
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> FN6. In addition, the Court noted that it had already recognized the " 'deliberately expansive' character of ERISA's preemptive provisions in *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 45-46, 107 S.Ct. 1549, 1552, 95 L.Ed.2d 39 (1987)." *Id.,* 510 U.S. at ---- n. 8, 114 S.Ct. at 525 n. 8. In *Pilot Life,* the Court observed that the legislative history of ERISA "emphasized both the breadth and importance of the pre-emption provisions" of ERISA. 481 U.S. at 46, 107 S.Ct. at 1552.
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> FN7. ERISA's saving clause, 29 U.S.C. § 1144(b)(2)(A), states: "Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any persons from any law of any State which regulates insurance, banking, or securities."

> [W]e discern no basis for believing that Congress, when it designed ERISA, intended fundamentally to alter traditional preemption analysis. State law governing insurance generally is not displaced, but "where [that] law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress," federal preemption occurs.... As the United States recognizes, "dual regulation under ERISA and state law is not an impossibility[;] [m]any requirements are complementary, and in the case of a direct conflict, federal supremacy principles require that state law yield."
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> 510 U.S. at ----, 114 S.Ct. at 526 (citations omitted).

"No decision of this Court has applied the saving